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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JURGEN HEINZ FABIAN, ARJEN SEIN,
JAN ADRIANUS VERHEIJ, and
ANDREA WILLIAMS

Appeal 2008-3157
Application 10/005,702
Technology Center 1700

Decided: June 30, 2008

Before EDWARD C. KIMLIN, LINDA M. GAUDETTE, and
MICHAEL P. COLAIANNI, *Administrative Patent Judges*.

COLAIANNI, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134 the final rejection of claims 1, 3, 5-8, and 10-16. We have jurisdiction over the appeal pursuant to 35 U.S.C. § 6(b).

We AFFIRM.

INTRODUCTION

Appellants' invention relates to pourable, water continuous frying compositions which are storage stable and show good spattering behavior and frying characteristics (Spec. 1). Appellants claim a pourable, water continuous frying composition which is an emulsion comprising, in relevant part, "more than 50 and up to 80 wt% fat, 0.1 to 5 wt% salt and 0.05 to 2 wt% lecithin as anti-spattering agent" and "0.35 to 5 wt.% of at least one emulsifier" (claim 1).

Claims 1 and 16 are illustrative:

1. Pourable, water continuous frying composition which is an emulsion and which has a Bostwick value at 15°C of at least 5, comprising more than 50 and up to 80 wt% fat, 0.1 to 5 wt.% salt and 0.05 to 2 wt% lecithin as anti-spattering agent, 0.35 to 5 wt.% of at least one emulsifier having a hydrophilic/lipophilic balance value of at least 7, and optionally a biopolymer, the amount of biopolymer when added being at most 0.3 wt% on total composition weight, the fat being dispersed in a water phase as droplets that have an average droplet size (d_{43}) of less than 8 μm .

16. The composition according to claim 1 comprising 55 to 75 wt% fat.

The Examiner relies on the following prior art reference as evidence of unpatentability:

Naotaka (as translated)¹

JP 10-113145

May 6, 1998

¹ We rely on the September 2007 translation provided by Schreiber Translations Inc. Both the Examiner and Appellants refer to JP 10-113145 as "PAJ." However, the first named inventor's last name is Naotaka. Accordingly, we refer to JP 10-113145 as "Naotaka" in this decision.

The rejection as presented by the Examiner is as follows:

1. Claims 1, 3, 5-8 and 10-16 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Naotaka.

Appellants separately argue claims 1 and 16. Accordingly, with regard to the propriety of the above rejection, we address the rejection with regard to the argued claim feature of claims 1 and 16.

OPINION

Appellants argue that the “more than 50 and up to 80 wt% fat” and “0.35 to 5 wt.% of at least one emulsifier” claim features as recited in claim 1 are not taught or suggested by the references (Br. 6). Appellants contend that there is no motivation to increase the fat content of the composition above 50 wt% because Naotaka discloses that doing so causes the undesired effect that the cooking becomes too oily (Br. 6). Appellants argue that Naotaka does not teach or suggest using a fat content between 55 to 75 wt% as recited in claim 16 (Br. 7). Appellants argue that Naotaka teaches away from using more than 0.3 wt% of emulsifier because of burning of the food material (Br. 6). Appellants contend that the Examiner has not pointed to any teaching by Naotaka that the salt with the lecithin function as an antispattering agent (Br. 7).

We have considered Appellants’ arguments and are unpersuaded for the reasons below.

Naotaka discloses a seasoning suitable for fry cooking (Naotaka ¶ [0001]). Naotaka discloses that a goal of the seasoning composition is to “decrease the spattering of the oil and moisture during the said cooking”

(Naotaka ¶ [0005]). Naotaka's composition is an oil/water (i.e., O/W) type emulsion that comprises, in relevant part, "at least 10-50 weight% [edible oil (fat)] and contains 0.03- 0.3 weight% of 1 type or 2 types or more with an HLB of 7, respectively, or more [emulsifiers]" and seasoning flavors, such as salt (Naotaka ¶¶ [0011]-[0012]). Naotaka discloses that one of the emulsifiers may be "zymolsis lecithins" (Naotaka ¶ [0011]).

Based on these disclosures, we are unpersuaded by Appellants' argument that Naotaka fails to teach or suggest having a fat content of more than 50 and up to 80 wt% as claimed. Naotaka indicates that the fat content of the seasoning composition may be "at least 10-50 wt%." Plainly, Naotaka discloses a composition having fat content greater than 50 wt%, such that Appellants "more than 50 and up to 80 wt% fat" (claim 1) and "55 to 75 wt% fat" (claim 16) claim features are taught or suggested by Naotaka.

Regarding Appellants' argument about the amount of emulsifier, we determine that Naotaka would have suggested using an emulsifier amount of 0.35% based on the reasonable expectation that the suggested value is so close to the disclosed value (i.e., 0.30 wt%) that the same desirable properties would be expected in either case. *Titanium Metals Corp. v. Banner*, 778 F.2d 775, 782 (Fed. Cir. 1985).

Contrary to Appellants' argument, we do not find that Naotaka teaches away from using more than 0.3 wt% emulsifier because of burning of the food material. Rather, Naotaka discloses "the food raw materials and seasoning and the like *often* burning in the frying pan and pans and the like when more than 0.3 weight% [emulsifier is used]" (emphasis added) (Naotaka ¶ [0015]). In other words, the burning of the food and seasoning does not always occur when more than 0.3 wt% emulsifier is used.

Accordingly, we do not find that Naotaka teaches away from using more than 0.3 wt% emulsifier.

Similarly, we do not agree with Appellants that Naotaka's disclosure that "the [fried food] *often* is undesirable due to excessive oiliness when finished cooking if more than 50 weight% [of fat is used in the composition]" (emphasis added) (Naotaka ¶ [0014]), fails to provide motivation for increasing the fat. Rather, the cited Naotaka disclosure merely indicates that the excessive oiliness "often" occurs, not that it always occurs. Furthermore, as noted above, Naotaka discloses that the fat content may be greater than 50 wt%.

Regarding Appellants' argument that the Examiner has not pointed to any disclosure that Naotaka's salt and lecithin function as an antispattering agent, we note Appellants do not contest that the particular salt and lecithin combination is taught by Naotaka. Accordingly, because the composition disclosed by Naotaka appears to be substantially identical to Appellants' claimed composition, Naotaka's seasoning composition must have the antispattering properties claimed by Appellants. *In re Spada*, 911 F.2d 705, 708 (Fed. Cir. 1990) ("Products of identical chemical composition can not have mutually exclusive properties."). In fact, Naotaka discloses that a goal of the seasoning composition is ". . . controlling the spattering of oil and moisture when heating . . ." (Naotaka ¶ [0006]).

Moreover, because Naotaka's composition is substantially identical, Appellants bear the burden of proving that Naotaka's composition does not necessarily or inherently possess the antispattering property of the claimed product. *In re Best*, 562 F.2d 1252, 1255 (CCPA 1977). Appellants have not provided any evidence to establish that Naotaka's composition having

the salt and lecithin does not possess the antispattering property. Appellants have not carried their burden.

For the above reasons, we sustain the Examiner's § 103 rejection of claims 1, 3, 5-8, and 10-16 over Naotaka.

DECISION

The Examiner's decision is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

tf/lis

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